

Court File No.: CV-17-576062

**ONTARIO
SUPERIOR COURT OF JUSTICE**

B E T W E E N :

RENE BREWER

Plaintiff

- and -

**IRWIN FEFERGRAD and ROYAL COLLEGE OF DENTAL
SURGEONS OF ONTARIO**

Defendants

**STATEMENT OF DEFENCE
OF THE DEFENDANT, ROYAL COLLEGE OF
DENTAL SURGEONS OF ONTARIO**

1. Except as specifically admitted herein, the Defendant, the Royal College of Dental Surgeons of Ontario, ("the "Royal College" or "the College") denies the allegations contained in the Statement of Claim.

The Parties

2. The Royal College is the governing body for dentists in Ontario, established pursuant to the *Dentistry Act*. The Royal College is further subject to the provisions of the *Regulated Health Professions Act, 1991*, ("RHPA") and the *Health Professions Procedural Code*.

3. The Plaintiff is the former Director of the Royal College's Professional Liability Program ("PLP").

4. The Defendant, Irwin Fefergrad ("Mr. Fefergrad"), is the Registrar of the Royal College.

5. At all material times, the Plaintiff reported to Mr. Fefergrad, and was appropriately fully answerable and accountable to Mr. Fefergrad, as her direct report.

Overview of Defence

6. This Statement of Defence is summarized as follows:

- (a) in the course of her employment, the Plaintiff proposed various initiatives which would result in an increase of her authority and power;
- (b) for reasons legitimately within the College's discretion, her proposals were not accepted;
- (c) the Plaintiff became increasingly dissatisfied about her employment, and acted out with abusive conduct toward others at the College;
- (d) the College attempted to correct her conduct, but the Plaintiff refused to acknowledge or co-operate;
- (e) the College ultimately decided to terminate the Plaintiff's employment, paying her all that was owing under the lawful terms of her employment contract;
- (f) the Plaintiff's other allegations of improper motive to terminate, etc. are without any factual or legal merit;
- (g) the College is entitled to claim the protection of s. 38 of the RHPA, for acts performed in good faith.

Plaintiff's Employment Contract

7. The Plaintiff commenced her employment with the College pursuant to an employment contract dated October 10, 2011 ("Employment Contract").

8. The Employment Contract expressly set out what the Plaintiff's entitlements were, in the event of a termination without just cause. Specifically, the Employment

Contract included the following term stipulating the Plaintiff's legal entitlements on termination of her employment without cause:

Following the probationary period, [the College] may terminate the Employee's employment without cause upon providing the greater of four (4) weeks' of notice for each completed year of service to a maximum of thirty-six (36) weeks and the Employee's entitlements under the Employment Standards Act, 2000 (as amended from time to time). The College may, at its sole option, provide payment of base salary in lieu of all or a portion of such notice. This shall constitute the Employee's entire entitlement to notice of termination. The College guarantees that the amounts payable upon termination, without cause, shall not be less than that required under the notice and severance pay provisions (if applicable) under the [Employment Standards Act "ESA"], provided that all such payments pursuant to the ESA shall be deemed to be payments on account of amounts owing under this Paragraph. In the event of the termination of employment under this Paragraph, [the College] shall continue to pay its share of the premiums for the [College's] Group Benefit Plan and Pension Plan for such time as required by the ESA...The Employee agrees that this provision shall survive any changes to the Employee's employment with the [College], regardless of the nature or duration of that employment.

9. The College states that the Plaintiff's employment was terminated on January 23, 2017, on the basis such termination was without just cause. Pursuant to the provisions of the Employment Contract, the College paid the Plaintiff the amounts owing thereunder, i.e the equivalent of 20 weeks' pay, and her benefits and pension were maintained for the period required by the ESA. Although not required by the Employment Contract, the Plaintiff was also offered outplacement counselling.

10. The College states that the performance of its obligations under the Employment Contract's termination provision as described in the paragraph above, represented the Plaintiff's "entire entitlement to notice of termination" as stipulated in the Employment Contract. The College states that the Plaintiff's claim for pay in lieu of notice and her other claims in this action are wholly precluded by the terms of her Employment Contract.

College Rejects Initiatives Proposed by Plaintiff in Course of Employment

11. In the course of her employment, the Plaintiff proposed various initiatives intended to substantially or fundamentally change the nature of PLP. Those proposed changes were:

- (a) Organizational changes intended to expand the Plaintiff's role by usurping authority of other departments;

- (b) Separating the PLP from the College to convert it into an essentially independent, autonomous body;
- (c) The establishment of a captive, out-of-province insurer for the PLP program;
- (d) The establishment of a national fund to compete with dental malpractice insurance policies in other provinces; and
- (e) her appointment as Chief Operating Officer of the College.

12. The College states that:

- (a) these proposals from the Plaintiff were matters within operational and organizational discretion;
- (b) these initiatives, had they been accepted, would have led to greater power and authority being acceded to the Plaintiff; and
- (c) none of these initiatives was required pursuant to any statutory mandate, or other form of legal requirement.

13. The College states that for reasons within the legitimate discretion of the College, it was determined not to pursue any of these initiatives.

14. The College states that the rejection of these initiatives led to the Plaintiff becoming increasingly upset and frustrated in her role. The Plaintiff interpreted the rejection of these initiatives as a personal affront, and seemed unable to accept that the College's exercise of its discretion had nothing to do with the Plaintiff in her personal capacity.

Plaintiff's Abusive Management Style

15. As the Plaintiff continued in her role, with her ambitions frustrated, she acted out against others, both within and outside her department. Her conduct included:

- (a) criticizing PLP employees in front of others;
- (b) losing her temper, resulting in yelling and slamming her fist on the table;
- (c) speaking to others in a harsh, abrupt and peremptory manner;
- (d) speaking down to employees in a disrespectful and disparaging manner;
- (e) micro-managing performance;
- (f) nit-picking criticisms of employees;
- (g) refusing legitimate and lawful requests for payment of overtime pay; and
- (h) discouraging employees from legitimate and lawful requests for vacation.

16. The College states that the Plaintiff's conduct as described in the paragraph above led to the following:

- (a) employees being reduced to tears;
- (b) employees feeling diminished, degraded and humiliated;
- (c) employees becoming fearful of discussing their concerns due to fear of reprisals;
- (d) employees feeling continually fearful of losing their jobs; and
- (e) employees avoiding communication with the Plaintiff out of fear of further ill treatment.

17. Mr. Fefergrad discussed the accomplishments and challenges of the PLP with the Plaintiff. He emphasized that the PLP's successes were due to the contributions of

many talented employees, and not the Plaintiff's efforts alone. He asked her to show that she appreciated the contributions of others. He asked her to demonstrate that she valued cooperation and teamwork. He asked her to show respect for College personnel.

18. Despite Mr. Fefergrad's comments, the Plaintiff persisted with her disrespectful treatment of others.

Events Leading to Termination of Plaintiff's Employment

19. In December, 2015, several PLP employees approached the College's Director of Human Resources ("HR") to express concerns about the Plaintiff's conduct. They asked that their names not be disclosed, due to fear of reprisal by the Plaintiff.

20. The Director of HR met with the Plaintiff to review these concerns, and allowed her time to respond with solutions.

21. In response to these concerns:

- (a) the Plaintiff insinuated that others were simply too sensitive;
- (b) by making out that others were too sensitive, the Plaintiff implied that she was not responsible for any of the concerns being expressed;
- (c) she denied engaging in any conduct that justified the concerns;
- (d) she rejected HR's offer to assist further, and expressed a lack of any need for HR to be involved; and
- (e) her response, overall, indicated skepticism and resistance to her being responsible for problems in PLP.

22. Although the Plaintiff offered to moderate her conduct and communication style, the College was concerned about the sincerity and reliability of her response, as she made clear she regarded the concerns to be unfounded, unreasonable, and the involvement of the Director of HR to constitute unwarranted interference.

23. Following her meeting with the Director of HR, the Plaintiff's conduct changed little, if at all. She continued to exhibit much of the same conduct as had been complained about. She refused to co-operate with the Director of HR in further addressing the issues raised with her, and acted toward him in a hostile manner. She repeatedly attempted to go above the head of the Director of HR, whose authority she refused to acknowledge.

24. In December, 2016, matters came to a head when the Plaintiff sent email correspondence to Mr. Fefergrad, in which she claimed the College to be rife with dysfunction, and patronizingly claimed Mr. Fefergrad to be well-meaning, but ignorant of the dysfunction she claimed existed, and she claimed him to be ignorant that he was acting on poor advice.

25. The Director of HR attempted to meet with the Plaintiff on December 13, 2016, but she peremptorily refused, again questioning his authority, and insisting Mr. Fefergrad intervene.

26. Mr. Fefergrad explained that it was appropriate for the Director of HR to be in charge and he had neither the time nor was it his role to be involved. He instructed the Plaintiff to cooperate with the Director of HR, to which the Plaintiff only reluctantly acceded.

27. When the Director of HR met the Plaintiff on December 20, 2016, she only complained about others and was not prepared to discuss problems emanating from her. She regarded others as being out to get her.

28. As of this point, it had become clear the Plaintiff would continue to refuse to acknowledge her primary role in creating tensions and rancour in the workplace and that she was unable to work in a team environment. Mr. Fefergrad concluded the Plaintiff's conduct was intractable. Accordingly, he concluded her employment should be terminated.

29. On December 22, 2016, the College's Executive Committee supported Mr. Fefergrad's decision that her employment be terminated.

30. Accordingly, pursuant to a termination letter dated January 23, 2017, the Plaintiff's employment was terminated and she was paid in accordance with the provisions of her Employment Contract, as set out and described in paragraphs 8 and 9 of this Statement of Defence, constituting the totality of the College's obligations under the Employment Contract.

RESPONSE TO THE PLAINTIFF'S ALLEGATIONS IN THE STATEMENT OF CLAIM

Alleged Invalidity of Termination Clause

Alleged Non-Compliance with s. 57(1) of the ESA (paragraph (i) of the Plaintiff's Response to Demand for Particulars)

31. In response to the Plaintiff's claim that the termination clause is unlawful because the termination clause permits termination without any notice prior to the end of the three-month probationary period, which she alleges to be less than the minimum required one-week's notice, the College denies the ESA requires one week's notice for employees with less than a year of employment. The College pleads and relies on s. 54 of the ESA, which clearly stipulates that the notice obligations under s. 57 (1) do not arise until the end of the Plaintiff's three-month probation period.

Alleged Failure to Provide for Continuance of Benefit Plans during Statutory Notice Period (paragraph (ii) of the Plaintiff's Response to Demand for Particulars)

32. In response, the Plaintiff pleads and relies on the following portions of the Employment Contract, as quoted above, which follow the provision regarding base salary in lieu of notice, as follows:

- (a) In the event of the termination of employment under this Paragraph, [the College] shall continue to pay its share of the premiums for the [College's] Group Benefit Plan and Pension Plan for such time as required by the ESA...
- (b) The College guarantees that the amounts payable upon termination, without cause, shall not be less than that required under the notice and severance pay provisions (if applicable) under the ESA, provided that all such payments pursuant to the ESA shall be deemed to be payments on account of amounts owing under this Paragraph.

33. It is therefore clear the College did in fact stipulate for the continuation of benefits coverage over the Plaintiff's statutory notice period, and the College therefore

states the Plaintiff's objections to the termination clause are frivolous and unfounded, and it is clear there is no violation of the ESA.

Alleged Injurious Falsehood and Vicarious Liability (par. 50, 54 (c) and 58 of the Statement of Claim)

34. The College denies the termination of the Plaintiff's employment was based on any falsehoods.

35. Regardless of the reason, the College states that Mr. Fefergrad, as Registrar, was invested with full legal authority as the highest level official of the College, to hire employees and terminate their employment, in addition to possessing general, overarching authority over the affairs and operations of the College.

36. Mr. Fefergrad notified the College's Executive Committee prior to terminating the Plaintiff's employment. The approval of the Executive Committee was not required. Mr. Fefergrad was legally entitled to act on his own authority.

Workplace Allegations (par. 53 and 59 of the Statement of Claim)

37. The College denies the Plaintiff's allegations about its workplace, and to the extent there were morale problems, such were caused by the Plaintiff's conduct as described above. In addition, the College denies the termination of the Plaintiff's employment was related to any issues she raised relating to the workplace.

38. In addition, the College states that the *Occupational Health and Safety Act* ("OHSA"), and in particular s. 50 thereof, constitute a comprehensive and exhaustive code for objecting to adverse treatment as a result of seeking enforcement of OHSA obligations.

39. The College respectfully submits the Superior Court of Justice is without jurisdiction to intervene or displace the authority granted under OHSA to the Ministry of Labour and the Ontario Labour Relations Board.

Reasons for Dismissal (paragraph 54 of the Statement of Claim)

40. The College:

- (a) denies the Plaintiff is or was a “whistleblower”;
- (b) states the Plaintiff’s employment was terminated for the reasons set out above, and not as a result of any retaliatory conduct;
- (c) any claim the termination of the Plaintiff’s employment was related to the issues alleged in paragraph 34 of the Statement of Claim is false, in that the decision to terminate her employment was already in process at that time ; and
- (d) none of the allegations made by the Plaintiff regarding her employment or termination thereof affect the enforceability of the termination provisions in the Plaintiff’s employment contract, which expressly state that the amounts payable on termination are the Employee’s “entire entitlement to notice of termination”

41. The College states that the legislature has enacted legislation to specify particular exceptions to the employer’s prerogative to terminate employment. To the extent the Plaintiff seeks to have the court regulate such issues, her claim fails to establish a valid cause of action.

Alleged Fiduciary Duties and Duty of Care (par. 46 of the Statement of Defence)

42. The College states that all or some of the Plaintiff’s allegations relate to the effects the work environment allegedly had on her incidentally, rather than through direct action related to herself. The College states that any ill effects the Plaintiff experienced from the work environment were caused by the Plaintiff’s own unjustified conduct, but in any event, her allegations do not constitute a cause of action.

s. 38 of the RHPA—Acts Done in Good Faith

43. The College states that all actions taken by it in respect of the Plaintiff's employment were conducted in good faith and in accordance with the power and authority conferred upon it pursuant to its governing and organizing statutes.

44. The College pleads and relies on s. 38 of the RHPA, which states as follows:

No action or other proceeding for damages shall be instituted against ... a College, ... for an act done in good faith in the performance or intended performance of a duty or in the exercise or the intended exercise of a power under this Act, a health profession Act... or a regulation or a by-law under those Acts or for any neglect or default in the performance or exercise in good faith of the duty or power.

Damages, Mitigation and General

45. The College states that the damages generally claimed by the Plaintiff are remote, excessive and not recoverable at law.

46. In the alternative, if the Plaintiff has suffered any damages, which are not admitted but expressly denied, the Plaintiff has failed to take all reasonable steps to mitigate such damages.

47. To the extent the Statement of Defence of Irwin Fefergrad contains additional defences not contained in this Statement of Defence, the College adopts such defences, to the extent they are applicable to the College.

48. The College further states that the Plaintiff, in wilful and wanton bad faith, has made false and reckless allegations against the Defendants of dishonest and deceitful conduct, thereby maliciously and vindictively impugning the integrity of the Defendants.

49. The Royal College therefore states that this action be dismissed, with costs on a full indemnity basis.

July 13, 2017

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SUPERIOR COURT OF JUSTICE

Proceeding commenced at Toronto

STATEMENT OF DEFENCE AND
COUNTERCLAIM
OF THE DEFENDANT, ROYAL COLLEGE OF
DENTAL SURGEONS OF ONTARIO

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